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No. 91-506

In The

Supreme Court of the United States

October Term, 1991

ENVIRONMENTAL DEFENSE FUND, INC.,

Petitioner,

v.

WHEELABRATOR TECHNOLOGIES INC. and WESTCHESTER RESCO COMPANY, L.P.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Respondents Wheelabrator Technologies Inc. and Westchester Resco Company, L.P. (collectively "Wheelabrator") raise in their brief in opposition the argument that section 306 of the Clean Air Act Amendments of 1990 ("CAAA") renders the issues raised by Environmental Defense Fund, Inc. ("EDF") in its petition for a writ of certiorari academic. This argument is not properly before the Court and should be disregarded. Moreover, Wheelabrator's argument is patently erroneous on the merits.

ARGUMENT

I. The Effect Of Section 306 Of The Clean Air Act Amendments Of 1990 On Section 3001(i) Of The Resource Conservation And Recovery Act Is Not Properly Before This Court.

An argument before the Supreme Court that would modify the judgment of the court below "cannot be presented unless a cross-petition has been filed." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n.14 (1985). *Cf. Granfinanciera, S.A. v. Nordberg*, 492 U.S 33, 39 (1989) (party may not defend judgment on a ground not raised in a cross-petition where affirmance on the alternate ground would expand or contract the rights of either party established by the judgment below). Wheelabrator has failed timely to file a cross-petition for a writ of certiorari on the issue of the effect of section 306 of the CAAA, 42 U.S.C. § 6921 note, on the administration of section 3001(i) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6921(i). For this reason, Wheelabrator's argument is not properly before this Court.

The "threshold question" addressed by the appellate court was "whether Congress, in adopting the Clean Air Act, [sic] Amendments of 1990 . . . intended to preclude the enforcement of existing environmental laws and regulations as they relate to the disposal of incinerator ash." *See* Appendix to Petition for Writ of Certiorari at A-8. EDF contended that section 306 only precluded additional regulation of ash generated by a resource recovery facility, but did not preclude enforcement of current regulations. After considering the statutory language and the legislative history of the CAAA, the appellate court concluded "that Congress did not intend to erect a bar to the enforcement of pre-existing environmental statutes and regulations." App. at A-8.

Having concluded that the case was properly before it, the appellate court necessarily went on to determine the current requirements imposed on a resource recovery facility by section 3001(i) of RCRA. Pursuant to the judgment below, whatever the current statutory and regulatory scheme, that scheme shall continue to be enforced prospectively by the Environmental Protection Agency ("EPA") and private citizens unless section 3001(i) is amended by Congress upon its reauthorization of RCRA.[1] Thus, the obvious result of the appellate court's decision

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[1] Although reauthorization proceedings for RCRA have begun, the Court can take judicial notice of the fact that it took approximately 8 years for Congress to reauthorize the Clean Air Act. Thus, it is far from clear that the Court's resolution of the significant environmental issues raised by EDF in its petition will not have an impact well beyond the initial reauthorization period.

is that the Clean Air Act Amendments of 1990 did not eliminate the prospective impact of this case.

More importantly here, the Clean Air Act Amendments of 1990 say nothing about the substantive requirements of section 3001(i) of RCRA. And it is this issue that EDF has presented to the Court in its petition. The interaction of section 306 of the CAAA and section 3001(i) of RCRA, as clearly recognized by the court below, is a wholly separate issue. Thus, it is for good reason that EDF failed to mention the CAAA in its petition for writ of certiorari. *See* Brief in Opposition, p. 2. Because the appellate court's holding regarding the CAAA is consistent with the argument advanced by EDF below, EDF obviously did not seek a review on writ of certiorari of this issue.

For the Court now to revisit the CAAA issue would not merely be to find an alternative ground on which to support the judgment of the court below as to the *meaning* of section 3001(i). The argument advanced by Wheelabrator in its brief in opposition regarding the effect of section 306 of the CAAA flatly contradicts the holding of the appellate court. Accordingly, to adopt Wheelabrator's argument would be to modify the judgment below. It certainly was Wheelabrator's prerogative to so petition this Court. However, if Wheelabrator wished to challenge the appellate court's judgment, it must have filed a cross-petition within 30 days of receipt of EDF's petition. *See* Sup. Ct. R. 12.3. Having failed to do so, Wheelabrator's argument is not properly presented to this Court and must be disregarded.

Even more disturbing, however, is Wheelabrator's failure even to mention the holding of the appellate court. The appellate court expressly rejected Wheelabrator's argument that resolution of the issues presented by EDF cannot have any prospective impact as a result of section 306 of the CAAA. The court unequivocally held that "the applicable regulatory scheme currently in existence is not rendered null and void as it relates to the regulation of incinerator ash". App. at A-10. By its omission, Wheelabrator effectively misrepresents the record and the law before this Court. The decision of the court below quite plainly is that section 306 of the CAAA does not preclude enforcement of section 3001(i) of RCRA, but that section 3001(i) exempts the ash generated by a resource recovery facility from the hazardous waste requirements of Subtitle C of RCRA. As indicated above, EDF does not challenge the first conclusion, but argues that the appellate court erred in its interpretation of section 3001(i).

Therefore, if EDF were ultimately to prevail on the issues presented in its petition, the Court would not nullify the appellate court's conclusion that the CAAA do not preclude enforcement of section 3001(i), but the Court would significantly, and prospectively, alter the appellate court's improper interpretation of what the current statutory and regulatory scheme is that should be enforced. Wheelabrator's failure to direct the Court's attention to the judgment below on this issue is inappropriate.

II. Section 306 Of The Clean Air Act Amendments Of 1990 Does Not Render This Court's Review Of Section 3001(i) Of The Resource Conservation And Recovery Act Academic.

Even assuming that Wheelabrator's argument regarding the CAAA is properly before this Court, the argument is without merit. Wheelabrator contends that the effect of the regulatory moratorium contained in section 306 of the CAAA is to eliminate any prospective impact from the Court's resolution of the meaning of section 3001(i). Thus, Wheelabrator argues, taking up this issue would be a waste of judicial resources. However, section 306 of the CAAA demonstrably does not limit the prospective effect of this case.

Section 306 of the CAAA provides that "for a period of 2 years after the date of enactment . . . ash from solid waste incineration units burning municipal waste shall not be regulated by the Administrator of the Environmental Protection Agency pursuant to Section 3001 of the Solid Waste Disposal Act." Pub. L. No. 101-549, 104 Stat. 2399 (1990) (codified at 42 U.S.C. § 6921 note). The accompanying committee report provides that section 306 was not intended to prejudice this litigation:

> The conferees do not intend to prejudice or affect in any manner ongoing litigation, including *Environmental Defense Fund v. Wheelabrator, Inc.* 725 F. Supp. 758 (2d Cir.) [sic] and *Environmental Defense Fund v. City of Chicago,* Appeal No. 90-3060 (7th Cir.), or any State activity regarding ash.

H. Rep. No. 952, 101st Cong., 2d Sess. 392 (Oct. 26th, 1990).

Congress may reconsider the issue of ash generated by a resource recovery facility during its reauthorization of RCRA. For that reason, section 306 of the CAAA provides that the EPA shall not promulgate further regulations on ash under section 3001(i). Presumably, at the time of reauthorization, Congress will determine whether it wishes to revise section 3001(i) to exempt ash from the requirements of Subtitle C. However, as a result of section 306, the EPA is now precluded from either listing, regardless of a facility-specific characteristic, incinerator ash as a hazardous waste *or* revising its current regulatory policy to exempt ash exhibiting such a characteristic from the requirements of Subtitle C.[2]

Nothing in section 306 suggests that the EPA may not *enforce* existing regulations. In the lexicon of administrative action, regulation and enforcement are not the same. "To regulate" signifies a specific administrative act that requires notice and a comment period. However, the EPA need not promulgate new regulations to enforce compliance with existing statutory or regulatory requirements under RCRA.[3] Indeed, Congress recognized this critical

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[2] Under EPA regulations, a solid waste is a hazardous waste if it is included on the lists, 40 C.F.R. §§ 261.30-261.33(f), or if it displays any one of four characteristics (ignitability, corrosivity, reactivity, toxicity), 40 C.F.R. §§ 261.21-261.24, and is not otherwise exempt, 40 C.F.R. § 261.3(a)(1). "[T]he characteristics define broad classes of wastes that are clearly hazardous, while the listing process defines some wastes that may pass the characteristic but are nonetheless hazardous wastes." 51 Fed. Reg. 21648, 21649, col. 1 (June 13, 1986).

[3] Significantly, section 306 of the CAAA did not amend section 3001, which imposes requirements on parties under RCRA. Indeed, in the case below the EPA was not required to

distinction in enacting the Hazardous and Solid Waste Amendments of 1984, which included section 3001(i). The legislative history states that Congress "believes the RCRA regulatory *and* enforcement program must be conducted in a manner that controls and prevents present and potential endangerment to public health and the environment." H.R. Rep. No. 198, 98th Cong., 2d Sess. 19-20, *reprinted in* 1984 U.S. Code Cong. & Admin. News 5576, 5579 (emphasis added).

Rather, section 306 was intended only to limit the ability of the EPA to alter the existing regulatory scheme before Congress had an opportunity to reconsider the issue in its reauthorization of RCRA. As the court below properly held, the only effect of section 306 of the CAAA is to "impos[e] a two year moratorium on any *new* EPA regulatory activity concerning incinerator ash." App. at A-10 (emphasis supplied). Clearly, Congress intended only to maintain the status quo until it took up the issue again in two years. Otherwise, its unambiguous statement in the legislative history that it did not intend to affect in any manner this litigation would make no sense.

CONCLUSION

For the reasons stated, Wheelabrator's argument regarding the effect of section 306 of the Clean Air Act Amendments of 1990 on section 3001(i) of the Resource Conservation and Recovery Act is both not properly

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take any action EDF brought suit in the district court to enforce section 3001(i). Section 306 clearly does not preclude *EDF* from maintaining such a suit.

before this Court and incorrect. Wheelabrator's remaining arguments in its brief in opposition are similarly without merit. Therefore, the requested writ of certiorari should issue.

Respectfully submitted,

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